



# Legal Capacity in Zambia

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Zambia's Obligations under the Convention on the Rights  
of Persons with Disabilities

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## **1. Introduction**

The Republic of Zambia ratified the United Nations Convention on the Rights of Persons with Disabilities<sup>1</sup> (CRPD) on February 2<sup>nd</sup> 2010. The CRPD entered into force on May 3<sup>rd</sup> 2008, and is a human rights instrument whose purpose is to reaffirm and explicitly recognize the rights and freedoms of persons with disabilities. It does not create rights that were not already contained in the “International Bill of Rights”, namely the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights with its two protocols, and the International Covenant on Economic, Social, and Cultural Rights. The CRPD was created along with its Optional Protocol, which gives citizens of the states that ratified it the right to complain to the Committee on the Rights of Persons with Disabilities (Committee) about violations of the CRPD by their state. Although Zambia ratified the CRPD, it did not ratify the Optional Protocol. As such, Zambia is bound by the CRPD under international law, but there are no means to enforce it through international instruments.

On the 21<sup>st</sup> of July 2012, Zambia adopted the Persons with Disabilities Act<sup>2</sup> (PWDA), a law domesticating the CRPD. This report presents an analysis of the obligations of Zambia under the article 12 of the CRPD, which addresses the right to legal capacity, and looks at whether the content of the PWDA is sufficient to uphold the right of persons with disabilities to legal capacity.

## **2. Zambia’s Obligations under Article 12 of the Convention on the Rights of Persons with Disabilities**

### **2.1 Article 12 of the Convention on the Rights of Persons with Disabilities**

The CRPD aims at protecting the rights and freedoms of persons with disabilities, and at promoting social development by putting the emphasis on measures in the areas of education, healthcare, social life and leisure, family and community, employment, et cetera. The CRPD also aims at embodying a paradigm shift in the way people think of disabilities. Instead of conceiving disabilities through the “medical model”, which sees them as infirmities of the human body, it sees them through the “social model”. The social model sees disabilities as created by barriers, which are themselves created by a society ill-suited to

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<sup>1</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, available at: <http://www.refworld.org/docid/45f973632.html> [accessed 23 August 2015].

<sup>2</sup> Persons with Disabilities Act No. 6 of 2012, Zambia.

deal with the differences of persons with disabilities. As such, article 12 of the CRPD is central to this paradigm change; it guarantees the right to a person with disabilities to have legal capacity, the legal recognition allowing one to enforce their civil rights in court.

Article 12 would turn out to be controversial among the state parties. Its first paragraph recognizes the right to personhood. The second recognizes the right to legal capacity, without defining it. Paragraph three establishes an obligation for the states to take appropriate measures to provide support to persons with disabilities who might need in exerting their rights. Paragraph 4 lists safeguards that shall be applied when any measures relating to legal capacity are taken. Finally, paragraph 5 guarantees more specific rights relating to legal capacity, such as ownership and inheritance of property, and the capacity to manage one's own financial affairs.

## **2.2 First General Comment of the Committee on the Rights of Persons with Disabilities**

On May 19<sup>th</sup> 2014, the Committee released its first General Comment. The comment adopts a narrower interpretation of article 12, and concludes that state parties need to move away from substitute decision-making regimes to fulfil their obligations under the CRPD. The Committee concludes that such a change is central to the paradigm shift that the CRPD seeks to bring<sup>3</sup>.

The Committee goes as far as saying that there are no possible circumstances under international human rights law in which a person's right to legal capacity might be limited<sup>4</sup>. It claims that article 4 paragraph 2 of the International Covenant on Civil and Political Rights allows no derogation from this right. The Committee lists other international human rights instruments which it considers as guaranteeing an absolute right to legal capacity, such as article 15 of the Convention on the Elimination of All Forms of Violence against Women, article 3 of the African Charter on Human and People's Rights, and article 3 of the American Convention on Human Rights<sup>5</sup>.

The Committee recognizes that legal capacity consists of two strands. The first, "legal standing", allows one to hold rights and to be recognized as a person before the law. The second, "legal agency", allows one to act on those rights and to have these actions recognised before the law<sup>6</sup>.

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<sup>3</sup> UN Committee on the Rights of Persons with Disabilities (CRPD), *General Comment No. 1: Equal Recognition before the law (Art. 12 of the Convention)*, 11 April 2014, CRPD/C/GC/1, at para. 3.

<sup>4</sup> *Ibid* at para. 5.

<sup>5</sup> *Ibid* at para. 6.

<sup>6</sup> *Ibid* at para. 13.

The Committee further accuses states party to the CRPD of having conflated the notions on mental capacity and legal capacity, the lack of the former often leading to a systematic denial of the other. The Committee also endorses schemes allowing persons with mental and intellectual disabilities to decide in advance their wills and preferences. However, it warns that the moment when to trigger such measures should also be planned in advance, and should not be based on a mere assessment that the person lacks mental capacity. Finally, the Committee concludes that paragraph 4 of article 12 of the CRPD must be read in light of the whole convention, and does not allow for substitute decision-making. The safeguards need to be applied to measures relating to help in decision-making regimes.

### **2.3 Reactions of Civil Society and of the International Community**

The General Comment's release brought reactions and criticism internationally. For example, several mental health specialists and academics published a report criticising the decision<sup>7</sup>. The critiques mostly centered on the concept of informed consent. Many countries and professionals have developed tools to help them assess whether or not a person has the capacity to understand information and to engage in a rational process of manipulating this information<sup>8</sup>. As long as someone has the capacity to provide informed consent, they should be allowed to make their own decisions. However, if they are not able to do so, then professionals, family members, and friends should be allowed to take decisions in their best interest. In many cases, forced treatment might actually be the only way to allow a person to reach a state where they will be able to give or deny consent<sup>9</sup>.

Some of the stronger reactions against the General Comment came from the international community of member states. When ratifying the CRPD, several states had issued reservations in which they explicitly declared that they interpreted article 12 as allowing them to maintain their substitute decision-making regimes. Amongst them are Australia, Canada, Estonia, Poland, and Norway.<sup>10</sup> Other countries would issue statements following the release of the General Comment.

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<sup>7</sup> Melvyn Colin Freeman et al. "Reversing hard won victories in the name of human rights: a critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities", online: (2015) *Lancet Psychiatry*, < [http://dx.doi.org/10.1016/S2215-0366\(15\)00218-7](http://dx.doi.org/10.1016/S2215-0366(15)00218-7) >.

<sup>8</sup> *Ibid* at p. 2.

<sup>9</sup> *Ibid* at p. 3.

<sup>10</sup> "Reservations and Declarations", online: Convention on the Rights of Persons with Disabilities, United Nations, New York, 13 December 2006, < [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=iv-15&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en) >.

Germany<sup>11</sup> and Norway<sup>12</sup> both defended in a statement their right to maintain substitute decision-making regimes. They agreed that, as affirmed by paragraph 1 of article 12, all persons have a right to legal standing. However, it is not contrary to the CRPD to restrain legal agency in cases where persons with disabilities are not able to make decisions even with the best support available. The two countries also pointed out that no states, not even a substantial minority, interpreted the article 12 as prohibiting guardianship regimes.

Denmark<sup>13</sup> and France<sup>14</sup> would also issue statements. They both supported Germany and Norway's claim that whereas the right to legal standing is absolute, the right to legal agency can be restrained in necessary cases. Both countries also pointed at the fact that the Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care, adopted by the UN in 1991, and the Declaration on the Rights of Mentally Retarded Persons, UN 1971, both provide for substitute decision-making regimes.

The General Comments of the Committee are not binding on the state parties, and it is true that very few countries, if any, have taken action to get rid of their substitute decision-making regimes.

### **3. Obligations of the Republic of Zambia**

As detailed in the previous section, there is a lot of contention surrounding the requirements of the article 12 of the CRPD. An interpretation prohibiting guardianship regimes certainly has some merit, and states that make the decision of moving away from such regimes would remain in the boundaries of the CRPD, insofar as they manage to protect all of the other rights guaranteed by the CRPD with their alternative regime.

The circumstances make it unlikely that maintaining a guardianship regime would be a breach of international law. In the case of Zambia, which did not ratify the optional protocol, such a conclusion would need to be reached by domestic law, which is even more unlikely. However, it is clear that in order

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<sup>11</sup> Federal Republic of Germany, *German Statement on the Draft General Comment on Article 12 CRPD*, Committee on the Rights of Persons with Disabilities, February 2014.

<sup>12</sup> Norway, *Draft General Comment No. 1 on Article 12 of the Convention on the Rights of Persons with Disabilities - submission by the Norwegian Government*, Committee on the Rights of Persons with Disabilities, February 2014.

<sup>13</sup> Denmark, *Response from the Government of Denmark with regards to Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law*, Committee on the Rights of Persons with Disabilities, February 2014.

<sup>14</sup> France, *Commentaire de la France sur le projet d'observations générales du Comité des droits des personnes handicapées, relative à l'article 12 de la Convention relative aux droit des personnes handicapées*, Committee on the Rights of Persons with Disabilities, February 2014.

to fulfil its international human rights obligations, Zambia would need to first offer tools to help in decision-making, and would need to submit any necessary guardianship regime to the safeguards listed in paragraph 4.

### **3.1 The Persons with Disabilities Act 2012**

Like most common law tradition countries, Zambia has a dual system. The CRPD thus needed to be domesticated, and was in July 2012 with the enactment of the Persons with Disabilities Act. The PWDA goes a long way in meeting the requirements of the CRPD. Still, some gaps remain between the two instruments, and the PWDA fails to meet all of the requirements of the CRPD.

The PWDA has a “quasi-constitutional” status, meaning that any law that contradicts it without containing clear provisions allowing it to do so will be void to the extent of the inconsistency. It expressly forbids any discrimination against persons with disabilities, and considers any refusal of reasonable accommodation to be discrimination. The PWDA also provides specific rights for all the sections of the CRPD, such as healthcare, education, social life and leisure, family and community, employment, et cetera. It maintains the Zambia Agency for Persons with Disabilities and gives a clear mandate to the Agency to uphold the rights and freedoms guaranteed by the PWDA. It insures proper participation of persons with disabilities by including them in the governing body of the Agency. Finally, the PWDA creates the office of Inspectorate, whose purpose is to ensure that the law is respected, and creates offenses people who do not respect it. Some key elements are however missing from the law, and many of them relate to the article 12 of the CRPD.

First, the PWDA makes no explicit mention of the rights of persons with disabilities to ownership and inheritance of property, or of the right to manage one’s own financial affairs. Property and financial autonomy are essential in order to be truly autonomous and to enjoy legal capacity. Arguably, these rights are defended by the anti-discrimination clause of the act. Since non-disabled persons enjoy them, it would be discriminatory not to allow persons with disabilities to do the same. However, the same could be said about most of the rights guaranteed in both the CRPD and the PWDA. The drafters of the CRPD made these rights explicit on purpose, and the same can be said of Zambian lawmakers for all the other rights explicitly recognized in the PWDA. In order to properly and practically ensure the rights of persons with disabilities, Zambia’s legislature should include these provisions in the PWDA.

Second, the PWDA does not provide for the creation of any help in decision-making scheme. It does include provisions guaranteeing the rights to information and accessibility, and to other rights required for

persons with disabilities to be able to make decisions. However, there are no clear and institutionalised way for persons to seek help in decision-making without fearing do be put under some kind of guardianship. The PWDA also does not create a mechanism that would allow persons with disabilities to take decisions about their life in advance, as recommended in the General Comment of the Committee. Financial constraints might make it harder for Zambia to create and enforce such a system on the short term, but the PWDA should at least create a legal obligation to take reasonable measures to inform and help persons with disabilities when they make important decisions.

Third, the PWDA does nothing to repeal or to modify the Mental Disorders Act<sup>15</sup>, which is currently allowing judicial authorities to put persons with disabilities under guardianship regimes. Similarly, it does not provide for any of the safeguards listed in paragraph 4 of article 12 of the CRPD.

### **3.2 The Mental Disorders Act**

The Mental Disorders Act is in contradiction with the obligations Zambia has under international human rights law, including but not restricted to the CRPD. The law dates from 1949, at which point Zambia was still a colony of the United Kingdom, and has never been significantly revised.

To begin, it is worth mentioning that the Mental Disorders Act, simply by its tone and qualifications of persons with disabilities, is inappropriate and prejudicial. It classifies persons with mental and intellectual disabilities into one of six categories: “suffering from a mental disorder”, “mentally infirmed”, “idiot”, “imbecile”, “feeble-minded”, and “moral imbecile”<sup>16</sup>.

The Mental Disorder Act establishes the procedure allowing a judge to put someone under a “control order”. Many parties may bring a person with a disability in front of a judge, notably law enforcement authorities, health workers, and friends or family. The judge must then have two medical practitioners examine the patient and determine if the person is “mentally disordered or defective”. The health practitioners are given a fair amount of discretion in determining the status of a person.

The judge shall then decide if the person is “mentally disordered or defective” based on the practitioners’ reports and on the following criteria:

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<sup>15</sup> Mental Disorder Act, Cap 305, Zambia.

<sup>16</sup> *Ibid at s. 5.*

"mentally disordered or defective person" means any person who, in consequence of mental disorder or disease or permanent defect of reason or mind, congenital or acquired-

(a) is incapable of managing himself or his affairs; or

(b) is a danger to himself or others; or

(c) is unable to conform to the ordinary usages of the society in which he moves; or

(d) requires supervision, treatment or control; or

\*See section 56 of the Medical and Allied Professions Act (Cap. 297)

(e) (if a child) appears by reason of such defect to be incapable of receiving proper benefit from the instruction in ordinary schools;<sup>17</sup>

A person can therefore be considered "mentally disabled or defective" based on professionals' reports and on any of these criteria, some being as vague as "unable to conform to the ordinary usages of the society", or being based on the perception that the person requires a treatment, regardless of the person's opinion about receiving such treatment.

To put a person under a "control order", the judge must be convinced of the person's "mentally disabled or defective" status, and must additionally conclude the following:

If, upon due consideration, the magistrate is satisfied that the patient is mentally disordered or defective and-

(a) is not under proper care, treatment or control; or

(b) is cruelly treated or neglected by any relative or other person having the care or charge of such patient; or

(c) is of suicidal tendency or is in any way dangerous to himself or others; or

(d) has committed or attempted to commit any crime or offence or has acted in a manner offensive to public decency; or

(e) is an inebriate, that is to say, a person who habitually drinks to excess, or who habitually uses any narcotic to excess; or

(f) if the person having the care, treatment or control of the patient consents;

the magistrate shall adjudge the patient to be a mentally disordered or defective person, and shall sign an adjudication order to that effect in the prescribed form.<sup>18</sup>

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<sup>17</sup> *Ibid* at s. 2

<sup>18</sup> *Ibid* at s. 10

The control order can therefore be emitted for a reason such as “not under proper care, treatment, or control”, once again without any obligation to ask the person’s opinion. Moreover, some criteria are not necessarily related to a person’s mental and intellectual condition, and since they would not lead to a non-disabled person’s removal of legal capacity, constitute discrimination. Examples of such criteria are “is an inebriate” or “has acted in a manner offensive to public decency”.

Once an adjudication order has been emitted, and before a control order is emitted, the magistrate has an obligation to be satisfied, by such means he or she sees fit, that the guardian is a fit and proper person to exercise care and supervision of the patient<sup>19</sup>.

Only a judge has the power to discharge a patient from adjudication and control orders. The guardian, relatives, friends, and family all have the power to petition a magistrate to hear the case. The judge shall then have two practitioners examine the patient once again and needs to be convinced that the person is sane.

### **3.3 Inconsistencies with the CRPD requirements**

The first thing to mention is that, in Zambia like in many other places, the notions of legal capacity and mental capacity are conflated. Once a person has been deemed to be “mentally disordered or deficient”, the person’s opinion does not matter anymore, at least from a legal point of view. If a judge deems it better for a patient to be put under control, or if an arbitrary criterion such as “inebriate” is met, the magistrate can unilaterally order guardianship.

For a guardianship regime to meet a looser interpretation of article 12, it would need to be based on informed consent. Instead of focusing on the mental status of a person, the state would need to have the medical practitioners focus on whether the person can formulate informed consent. If the person has the capacity to do so, he or she should retain his or her legal capacity, regardless of any diagnosis.

The guardianship regime would also need to provide the following safeguards found in paragraph 4 of article 12 of the CRPD. More generally, article 12 requires that safeguards be effective and appropriate to prevent abuse, and be in accordance with international human rights law. More specifically, the following safeguards are required:

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<sup>19</sup> *Ibid* at s. 13.

First, measures need to “respect the rights, will, and preferences of the person”. The state of Zambia is free to make its own provision to fulfil this criterion, but it is clear that the person needs to be consulted before a decision is made.

Second, the measures need to “[be] free of conflict of interest and undue influence”. A judge may already be considering this criterion when evaluating if the guardian is fit for the responsibility. There is however no explicit obligation to do so. There is also no legal requirement for the guardian to avoid conflicts of interest or undue influence when making decisions relating to the person with a disability.

Third, the measures need to “[be] proportional and tailored to the person’s circumstances”. The Mental Disorders Act allows no judicial discretion to tailor a person’s decision-making regime to his or her need. It provides for a binary system where a person is either free or under control. The law would need more nuances to allow proportionality and tailoring.

Fourth, the measures need to “apply for the shortest time possible”. Under the current system, there is no limit to the control order of a person. A judge should be able to emit temporary or conditional control orders when circumstances allow it. The magistrate should also be able to ensure oversight to make sure that the regime is maintained as shortly as possible.

Fifth, the measures need to “[be subjected] to regular review by a competent, independent, and impartial authority or judicial body”. Any order should come with some competent, independent, and impartial review scheme. Relevant authorities might be designated to regularly evaluate a person’s situation, or the control order might need to be regularly renewed.

Sixth, the measures “shall be proportional to the degree to which such measures affect the person’s rights and interests”. In addition to be proportional to a person’s need, a magistrate should also take into account the way such measures affects a person’s rights and interests. Two persons whose conditions are similar but whose interests are differently affected should be given different measures when the circumstances allow it.

#### **4. Conclusion**

There is no consensus on the international human rights obligations relating to the legal capacity of persons with disabilities. While some say that states that ratified the CRPD should move away from

substitute decision-making regimes towards help in decision-making ones, others think that states only have a duty to promote help in decision-making and to subject their substitute decision-making schemes to proper safeguards. Even with a looser interpretation of the CRPD, Zambia fails to fulfil the requirements of article 12. Zambia would need to include specific rights related to legal capacity in the PWDA, such as the right to property ownership and inheritance, and the right to manage one's own financial affairs. Zambia would also need to promote help in decision-making. Finally, the country would need to bring important modifications to its guardianship regime to insure that it is not systematically conflated with mental capacity, and that the safeguards listed in paragraph 4 of article 12 of the CRPD are respected.